APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment I

Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES—42 U.S.C. 1983 Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and an action at law, suit in equity, or other proper proceedings for redress.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

. . . .

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any such act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

28 U.S.C. § 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

28 U.S.C. 1331(a) the district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

ILLINOIS STATUTES, CHAPTER 111-2/3
ILLINOIS REVISED STATUTES 1967

Sec. 32. General duties of public utilities. . . .

"All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

Section 63 Eminent Domain

59. When necessary for the construction of any alterations, additions extensions or improvements ordered or authorized under sections 50 or 58 or subdivision (a) of sections 81 of this Act[1] any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

Rules and Regulations—

ILL. C. C. NO. 1
Section 1
Second Revised Sheet 1
Canceling First Revised Sheet 1

ILLINOIS BELL TELEPHONE COMPANY
GENERAL LOCAL EXCHANGE TARIFF
TELEPHONE SERVICE
GENERAL REGULATIONS

. . . . .

5. OWNERSHIP AND USE OF THE EQUIPMENT —Equipment, instruments and lines on subscriber's premises, furnished by the Telephone Company, shall be and remain the property of the Telephone Company, whose agents and employees have the right to enter said premises at any reasonable hour for

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[1] Sections 50, 62, and 85 par. (a) of this chapter.

the purpose of installing, inspecting or repairing the instruments and lines or for the purpose of making collections from coin boxes and, upon the termination of the service, for the purpose of removing such instruments and lines. Such equipment is not to be used for performing any part of the work of transmitting, delivering or collecting any telephone message where any toll or consideration has been or is to be paid any party other than the Telephone Company, without the written consent of the Telephone Company.

. . . .

Issued June 30, 1964 Effective August 1, 1964
By G. L. Seaton, Assistant Vice President
212 West Washington Street, Chicago, Illinois, 60606

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16901

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,
Plaintiffs-Appellants,
v.
ILLINOIS BELL TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 25, 1969

Before CASTLE, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and KERNER, *Circuit Judge*.

HASTINGS, *Senior Circuit Judge*. Plaintiffs Thomas Kadlec, James W. Kadlec and Isaac Grinstead appeal from an order of the district court granting defendant Illinois Bell Telephone Company's motion to dismiss plaintiffs' second amended complaint, as amended.

Plaintiffs Thomas and James W. Kadlec are engaged in the business of selling automobile parts, rebuilding parts and providing a towing service. The business is operated at two locations, the largest of which, known as Kankakee Auto Parts, is near the city of Kankakee, Illinois. The other establishment, Skokie Automotive, is located in Niles, Illinois. Plaintiff Grinstead is a night

watchman at the Kankakee location and lives in a trailer just outside such property.

Illinois Bell contracted with Thomas Kadlec to provide and install three Call-Pak lines. Pursuant to these agreements, defendant installed Call-Pak service in plaintiff Grinstead's trailer; another line was supplied a small house, presumably Thomas Kadlec's residence, situated on the Kankakee business property; and the third installation was made on the Niles property at the residence of James Kadlec.

Designed for residential use exclusively, Call-Pak service provides telephone service at a flat fee instead of at a rate based upon the time-distance-unit cost formula which is customary with business telephone service.

On March 16 and 17, 1967, pursuant to Illinois Bell's regulations[1] and sometime after the installation of these Call-Pak lines, defendant terminated its Call-Pak service to plaintiffs; *other telephone service provided to plaintiffs by defendant was not discontinued.* The "shut-off" of the Call-Pak service obviously was the result of defendant's determination that plaintiffs had been improperly using this particular service for other than residential purposes.

Plaintiffs' original complaint, as amended, alleged that defendant's action of discontinuing the Call-Pak service violated their constitutional rights. They further con-

[1] Appellants' residential Call-Pak service was discontinued by the defendant pursuant to its tariff which is on file with the Illinois Commerce Commission.

Apparently, defendant terminated the service on the authority of the following regulation contained in the tariff:

"OWNERSHIP AND USE OF THE EQUIPMENT — Equipment, instruments and lines on subscriber's premises, furnished by the Telephone Company, shall be and remain the property of the Telephone Company, whose agents and employees have the right to enter said premises at any reasonable hour for the purpose of installing, inspecting or repairing the instruments and lines or for the purpose of making collections from coin boxes and, upon termination of the service, for the purpose of removing such instruments and lines. Such equipment is not to be used for performing any part of the work of transmitting, delivering or collecting any telephone message where any toll or consideration has been or is to be paid any party other than the Telephone Company, without the written consent of the Telephone Company."

tended that the regulations under which defendant terminated this service violate the Federal Constitution. In addition, plaintiffs prayed for restoration of the Call-Pak service and for damages for defendant's allegedly wrongful termination of appellants' service. The district court in a written memorandum opinion dismissed the original amended complaint on the ground that the proper forum for the action was the Illinois Commerce Commission rather than the district court.

Following this dismissal, plaintiffs filed a further amended complaint which asked only for damages on the grounds that defendant's conduct had violated the Civil Rights Act, 42 U.S.C.A. § 1983, and Amendments I, IV, XIV of the Constitution. This amended complaint, together with a subsequent amendment thereto, was dismissed by the district court for failure to state a cause of action. Appeal is taken from the dismissal of this second amended complaint, as amended.

The sole issue presented is whether defendant's conduct of discontinuing plaintiff's Call-Pak service fell within the purview of the Civil Rights Act, 42 U.S.C.A. § 1983, which provides:

> "Every person who, *under color of* any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and an action at law, suit in equity, or other proper proceedings for redress." [Emphasis supplied.]

or within the conspiracy section of the Act, § 1985.

It is well-settled that in order to establish a claim for damages under § 1983 of the Civil Rights Act the conduct complained of must have been engaged in under color of law and such conduct must have infringed upon the rights, privileges or immunities secured to the complaining party by the Constitution or laws of the United States. *Haldane* v. *Chagnon*, 9 Cir., 345 F. 2d 601, 603 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924, 930 (1963); *Jemzura* v. *Belden*, N.D.N.Y., 281 F. Supp. 200, 205-06 (1968).

At least one of the two elements essential to maintaining a claim under § 1983 is missing in the instant case. Under the facts of this case, we are of the opinion that defendant telephone company was not acting under the authority or pretense of any Illinois state statute, regulation, custom or usage in discontinuing plaintiffs' Call-Pak service. Thus, the second amended complaint, as amended, was properly dismissed by the district court for failure to state a cause of action under § 1983.

Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or cooperated in this suspension of service.

The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. The § 1983 requirement of conduct taken under color of law "* * * can rarely be satisfied in the case of anyone other than a state official." *Jabson* v. *Henne*, 2 Cir., 355 F. 2d 129, 133 (1966); *Weyandt* v. *Mason's Stores, Inc.*, W.D.Pa., 279 F. Supp. 283, 288 (1968). Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983.

We have carefully reviewed the cases cited by plaintiffs in support of their contention that defendant telephone company acted under color of law. These cases are readily distinguishable from the instant case and are not controlling. In all of the cases cited where conduct under color of law was found to be present, there existed greater state involvement or control than is alleged in this case.

The rationale of the Supreme Court of Rhode Island in *Taglianetti* v. *New England Tel. & Tel. Co.*, 81 R.I. 351, 103 A. 2d 67, 71 (1954) is relevant to and in accord with our conclusions reached in the instant appeal. In *Taglianetti*, the court ruled that the acts of a telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an organ of the state. In reaching this conclusion, the court stated:

> "Regulations * * * are prescribed [by the telephone company] * * * solely to govern the use of its telephones by persons with whom it has contracted to provide telephone service and such regulations are in the nature of conditions attached to the right to the continuance of service. Action taken initially [by the company] * * * to impose the penalty therein prescribed for the violation of such conditions is in no sense action by the state. * * * [T]he fact that the regulations are filed with the division of public utilities and are approved by the administrator does not transform them into acts of the state. Such filing and approval are merely incidents of the state's regulatory supervision * * * and are designed to inform the patrons thereof of their rights and obligations in the use of the service * * *."

The issue of whether there was state action in *Taglianetti* was more sophisticated than in the present case. In *Taglianetti*, defendant telephone company disconnected the telephone there in question at the request of the police; in the case at bar, there is no indication that any branch or agency of the state ordered, requested or even encouraged the discontinuance of plaintiffs' service.[2]

Here there is no showing that defendant telephone company acted under color of law in terminating the service; as a consequence, no action for damages may be maintained under § 1983 of the Civil Rights Act. The district court's dismissal of appellants' second amended complaint, as amended, was proper and should be affirmed.

With respect to appellants' allegations under the conspiracy section of the Civil Rights Act, § 1985, we do not find facts sufficient to support such a claim; the pleadings with respect to § 1985 were merely conclusory in nature and therefore were properly dismissed by the district court.

The judgment of the district court is affirmed.

AFFIRMED.

[2] No opinion is expressed as to whether the results in this case would be altered if the defendant had terminated the appellants' service in cooperation with, at the request of or under the orders of the state.

KERNER, *Circuit Judge*, concurring in the result. I agree with my brethren that the mere filing of regulations with a state does not convert private action under such regulations into action under color of state law. Nor would it be sufficient to show color of state law to say that an action was performed by a person who functions under a state license, *e.g.*, barbers, doctors, horseshoers or polygraph operators. Nor is color of state law shown by the fact that a corporation or other group functions by virtue of a state charter of incorporation, registration as a foreign corporation or a certificate of doing business under an assumed name. Something more is required; whether it be action in concert with state or local officials, as in *United States* v. *Guest*, 383 U.S. 745 (1966), and *United States* v. *Price*, 383 U.S. 787 (1966), or something such as a business whose operation is so intertwined with the state as to be inseparable from it, as in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Meredith* v. *Allen Cnty. War Mem'l. Hospital Comm'n.*, 397 F. 2d 33 (6th Cir. 1968).

However, I do believe that, under appropriate circumstances, it may be possible to demonstrate that a privately-owned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether 1) the entity is subject to close regulation by a statutorily-created body (such as the Illinois Commerce Commission), 2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given a total or partial monopoly by the regulatory body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity, 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show color of law in some cases and that nothing less than all may be required in other cases. Each case will depend on its facts. For example, in *Public Utilities Comm'n.* v. *Pollak*, 343 U.S. 451 (1952), the Court held (343 U.S. at 462):

> We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. 81 P.U.R. (N.S.), at 126. [Note omitted.]

See also cases cited in *Burton* v. *Wilmington Parking Authority, supra* at 725, n. 2, and *United States* v. *Price, supra* at 794-95, n. 7.

In order to prevail against a motion to dismiss for failure to state a cause of action, a complaint which relies on 42 U.S.C. § 1983 must affirmatively show that the acts complained of were done under color of law. The amended complaint before us lacks the specific allegations (as set forth above) which would show this necessary statutory element. Because this complaint fails at the threshold, it is not necessary to decide the issues relating to the alleged unconsented entry of defendant on plaintiffs' premises or the termination of service without notice and hearing.

For these reasons, I concur in the result reached by the majority.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3695—The Scheffer Press, Inc., Chicago, Illinois—2-25-69—200

[89] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—67-C-510) * *

MEMORANDUM OPINION.

Defendant's Motion to Dismiss

Plaintiffs claim that the actions of defendant Illinois Bell Telephone Company in discontinuing "Call-Pak" telephone service rendered to them in Kankakee and Skokie, Illinois, constitute a violation of their constitutional rights, as guaranteed by the First, Fourth, and Fourteenth Amendments. In addition, they allege that any regulations or laws under which Illinois Bell discontinued their service "violate and are contrary to Amendments I and XIV of the Constitution of the United States."[1]

[90] Jurisdiction is based on 28 U. S. C. Sections 1331 and 1343, and on the Civil Rights Act, 42 U. S. C. Section 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Defendant moves to dismiss on the grounds that plaintiffs have not exhausted their administrative remedies, and that plaintiffs have no constitutional right to Call-Pak service.

From the pleadings and briefs, the facts appear to be essentially these. Plaintiffs operate auto parts businesses

1. Paragraph 24 of the complaint.

in Skokie and Kankakee, which Illinois Bell services via business telephone lines. In addition, Illinois Bell contracted with plaintiffs to furnish two residential "Call-Pak lines, one to the home of Thomas Kadlec, and the other to a [91] small house located on the property of the Kankakee auto parts business." Such Call-Pak lines apparently are less expensive than commercial telephone lines, and are reserved for non-commercial use. A dispute arose over the propriety of the plaintiffs' use of the Call-Pak telephone service, and on March 16 and 17, 1967, pursuant to the tariffs and regulations on file at the Illinois Commerce Commission, the telephone company terminated the Call-Pak service but left the commercial service intact.

Although plaintiffs urge various constitutional grounds in support of their claims, defendant takes the position that only a contract dispute is involved. In any event, defendant insists that the proper forum for this action is before the Illinois Commerce Commission.

We agree. The Illinois Commerce Commission enjoys extensive regulatory power over telephone utilities pursuant to the Public Utilities Act of Illinois, Chap. 111⅔, Ill. Rev. Stat. The Commission has general supervision over the rates, classifications, contracts, practices, rules and regulations of telephone utilities. Section 72 of [92] the Act provides:

> ". . . No proceeding to contest any rule, regulation, decision or order which the Commission is authorized to issue without a hearing and has so issued shall be brought in any court unless application shall have been first made to the Commission for a hearing thereon and until after such application has been acted upon by the Commission, nor shall any person or corporation in any court urge or rely upon any grounds not set forth in such application for a hearing before the Commission . . ."

Plaintiffs charge that the rules and regulations relating to Call-Pak telephone service under which defendant discontinued plaintiffs' service, are unconstitutional. Therefore, according to the mandate of Section 72, they must proceed first before the Commission. Plaintiffs undisputedly have not taken this controversy to the Commission, but by virtue of their constitutional claims attempt to maintain jurisdiction initially in this court. They argue that the Illinois Commerce Commission has no power to determine whether a utility has [93] violated the Federal Constitution, citing *Pullman Co.* v. *I. C. C.*, 390 Ill. 40 (1945).

But that argument in this court's opinion is of no merit. As defendant correctly points out, the Commission not only may examine issues of federal constitutional law, but under the Supremacy Clause of the Constitution, (Article VI, Clause 2), is undoubtedly required to do so. It is fundamental that decisions of state regulatory bodies must conform to constitutional standards. See *Application of Northwestern Bell Telephone Co.*, 6 N.W. 2d 165 (S. Dak. 1942); *United States* v. *Mayo*, 47 F. Supp. 552 (D. C. Fla. 1942), affirmed 319 U.S. 441 (1943); *Sperry* v. *State of Florida ex rel. Florida Bar*, 373 U. S. 379 (1963).

The case of *Pullman Co.* v. *I. C. C.*, supra, cited by plaintiffs, does not support their position. In that case, the Supreme Court held that the Commerce Commission incorrectly based an order upon a federal statute, which was inapplicable to the facts in issue, and which neither party had thought relevant or adduced evidence upon. The Court did not hold that the Commission may not consider issues of federal law, but rather intimated [94] that in a proper case and after a proper hearing, the disputed statute would be applicable to matters coming before the Commission.

The courts have consistently declined jurisdiction over disputes within the competence of regulatory bodies. The doctrine of primary jurisdiction was first established by

the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1906). Its rationale was plainly spelled out by Mr. Justice Frankfurter in *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952):

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947); *Southwestern Sugar and* [95] *Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411 (1959); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963).

The courts of this jurisdiction follow the doctrine. In *Chicago Automobile Trade Association* v. *Madden*, 328 F. 2d 766, 769 (7th Cir. 1964), although dealing with an exhaustion of remedies issue rather than one of primary jurisdiction,[2] the Court of Appeals for this Circuit required

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2. The distinction between the doctrines of primary jurisdiction and exhaustion of remedies is this. Primary jurisdiction applies where, on the allegations made, the court and the agency have concurrent jurisdiction over the subject matter, but the issues are within the administrative competence of the agency. Exhaustion of remedies applies where the court does not acquire jurisdiction over the subject matter until the administrative remedies have been exhausted. Thus the agency's jurisdiction is considered to be exclusive.

In view of the disposition which we will make of this motion, we need not reach the question of whether the complaint sufficiently alleges a constitutional deprivation so as to be cognizable under Sec. 1983. Thus, technically, since the complaint alleges a claim arising under the Constitu-

the plaintiffs to fully exhaust their remedies before the Labor Board before turning to the courts. [97] The principles stated there are equally applicable here:

> "An allegation of unconstitutional harm is insufficient to warrant equitable intervention where pursuit of administrative remedies might ultimately render judicial disposition of such issues unnecessary. In an analogous situation in Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 . . . it was observed that:
>
> > '. . . the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim.' "

See *Vapor Blast Mfg. Co.* v. *Madden,* 280 F. 2d 205 (7th Cir. 1960).

In addition, the Illinois courts have consistently held that the procedures specified in the Public Utilities Act must be followed, before the aid of the courts may be invoked. *City of Wheaton* [98] v. *Chicago A. & E. Ry. Co.,* 3 Ill. App. 2d 29 (1954); *Colton* v. *Commonwealth Edison Co.,* 349 Ill. App. 490 (1953).

Indeed the Illinois Commerce Commission was created to deal with disputes of this kind, and in the course of its history has developed considerable expertise in these matters. Were we to bypass the Commission in this case, it is

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tion, we have concurrent jurisdiction with the Commerce Commission, at this point. Thus primary jurisdiction, rather than exhaustion, is the proper doctrine to invoke in this situation. Since the underlying principles of both doctrines are the same, namely that the agency's expertise should initially be exercised, exhaustion cases such as Madden are equally persuasive in primary jurisdiction cases like this one.

conceivable that this court would be forced to decide every dispute between a subscriber and the telephone company in which constitutional allegations were made. We would be collaterally attacking the legislature's wisdom in creating the Commission were we to decide the merits of this case.

In light of the overwhelming preponderance of authority cited above, the Commerce Commission is the proper forum for this action. Plaintiffs' allegations of constitutional deprivation do not change that result. Indeed, defendant has set forth impressive authorities challenging the assertion that the right to receive Call-Pak service is constitutional in nature.[3] Furthermore, there [99] is a serious question whether, on these facts, plaintiffs may maintain a suit under section 1983.[4] But in view of the plaintiffs' failure to seek relief before the Illinois Commerce Commission

3. See *Holt* v. *New England Teleph. & Telegr.*, 11 P. U. R. 3d 502 (Mass. Comm. 1955); *Katz* v. *American Tele. & Telegr.*, 86 P.U.R.N.S. 65 (Fed. Commun. Comm. 1950). In addition, see *Sarelas* v. *Illinois Bell Tele. Co.*, 42 Ill. App. 2d 372 (1963), where the court held that the only relationship between a utility company and its subscriber is one of contract.

4. Plaintiffs mistakenly suggest that Judge Will's decisions in *Palma* v. *Wilson, et al.*, 66 C 437, and *Mamolella* v. *Powers, et al.*, 67 C 212, may be governing in the case at bar. Although Judge Will denied Illinois Bell's motions to dismiss and for summary judgment in those cases, the complaints alleged that Illinois Bell had conspired with certain police officers to discontinue plaintiffs' telephone service, and sought money damages in addition to equitable relief. Judge Will did hold that a cause of action was stated under Sec. 1983 on those facts since the alleged actions were taken under color of law. But he dismissed those parts of the complaints seeking restoration of service on the ground that they should properly be heard by the Illinois Commerce Commission. In the instant case, although both injunctive and monetary relief is sought, no conspiracy is alleged, so that there is serious question whether Illinois Bell, acting alone, acted under color of law.

before bringing this suit, our dismissal of this action must be based solely on that deficiency, and need not reach the other issues raised by defendant.

Defendant's motion to dismiss is granted.

[100] Enter: /s/ A. L. Marovitz,

Abraham L. Marovitz,
Judge.

Dated:
October 13, 1967.

[166] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—67-C-510) * *

MEMORANDUM OPINION.

Defendant's Motion to Dismiss Amended Complaint.

In their Amended Complaint, plaintiffs claim that the actions of defendant Illinois Bell Telephone Company in discontinuing telephone service rendered to them in Kankakee and Skokie, Illinois, constitute a violation of their constitutional rights, as guaranteed by the First, Fourth, and Fourteenth Amendments. Jurisdiction is allegedly founded on the Civil Rights Act, 42 U. S. C. Sec. 1983, and on 28 U. S. C. Sections 1331, 1343.

In a memorandum opinion dated October 13, 1967, we dismissed plaintiff's original complaint as amended herein, on the ground that the Illinois Commerce Commission had primary jurisdiction over [167] the issues. The facts alleged in the amended complaint are essentially the same as set forth at pages 2-3 of that opinion. It, therefore, is unnecessary to restate them here. However, plaintiffs no longer seek equitable relief in the form of restoration of service, and do not charge that the applicable tariffs, under which defendant purportedly acted, are either violative of state law or the federal Constitution. They merely seek damages for the actions of defendant, under alleged color of law, which assertedly deprived them of their constitutional rights.

Defendant again moves to dismiss. However, we do not think the same considerations which guided our original order of dismissal may be relied upon here. The original complaint, inter alia, sought equitable relief and challenged the validity of certain tariffs and regulations governing the operations of defendant. As such, and in view of Section

72 of the Public Utilities Act of Illinois (Chap. 111⅔, Ill. Rev. Stat.), we believed the issues presented to be within the primary purview of the Illinois Commerce Commission. However, the issues now before the Court are essentially of a [168] legal character, directly presenting no issues of tariff construction, and are of a kind with which the Illinois Commerce Commission has no particular competence to deal. Furthermore, plaintiffs have eliminated their demand for equitable relief, the only remedy available before the Commerce Commission. It is clear that the Commission has no authority to award damages, the only relief presently sought by the plaintiffs.

Where the only issues relate to the constitutionality of certain activities of a public utility, and whether or not a customer of that utility has a constitutional right to such service, only legal questions of a kind not within the special expertise of the administrative commission need be decided. A federal court is the proper forum to decide those questions, and the doctrine of primary jurisdiction is inapplicable. Hence, by restyling their complaint, plaintiffs have avoided the thrust of our original order of dismissal.

However, the motion to dismiss presents several other issues. Defendant contends that plaintiffs have no constitutional right to telephone [169] service, which is protected by either the First, Fourth, or Fourteenth Amendments to the Constitution.

It must be recognized that this is a case in which the telephone company alone, is charged with conducting an illegal search and seizure upon plaintiff's property for the purpose of inspecting telephone equipment, and with unlawfully terminating plaintiff's telephone service. There is no allegation of a conspiracy with the police, as in *Palma* v. *Wilson*, No. 66 C 437, N. D. Ill., and *Mamolella* v. *Powers*, No. 67 C 212, N. D. Ill., or that the company's activities were carried out at the direction of the police as in *Sokol*

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v. *Public Utilities Commission,* 53 Cal. Rept. 673, 418 P. 2d 265 (1966), all of which were cited in support of plaintiffs' position.

The law is reasonably clear that where telephone service is discontinued without adequate procedural safeguards, a customer may be able to bring an action in the federal courts against the telephone company for restoration of service. See *Telephone News System* v. *Ill. Bell Tele. Co.,* 220 F. Supp. 621 (N. D. Ill. 1962); *Andrews* v. *Ches. & Pot. Tel. Co.,* 83 F. Supp. 966 (D. D. C. 1949). The theory of such an action is less clear. After careful research [170] we have been unable to discover any reported cases involving the telephone company as sole defendant, which were brought under Sec. 1983, and in which only damages were sought. Indeed in virtually all of the cases brought to our attention, the police or other authorities have notified the phone company that the customer was conducting gambling or other illegal operations over the telephone, and have requested that service be disconnected. And, the plaintiffs have invariably sought equitable relief, rather than damages.

Even accepting their theory of arbitrary disconnection, plaintiffs have not demonstrated to the court that any First Amendment right has been violated. The dictum in *Sokol* v. *Public Utilities Comm.,* supra, should not be controlling in a suit brought under Sec. 1983. Indeed, if the termination was arbitrary, the plaintiffs have their remedy before the Illinois Commerce Commission. They may only pursue a civil rights action if some right, privilege or immunity has been abridged under color of law. In the absence of any persuasive authority that plaintiffs have a right to telephone service under the First Amendment which may have been [171] infringed by defendants' activities, we shall not create one.

Furthermore, we reject plaintiffs' contention that Illinois

Bell is governed by the Supreme Court decisions in *Camara* v. *Mun. Ct.*, 18 L. Ed. 2d 930 (1967); and *See* v. *Seattle*, 18 L. Ed. 2d 943 (1967). Those cases, which required governmental officials to obtain search warrants before entering private residences or commercial buildings for purposes of public health inspections have not been held applicable to private parties. Illinois Bell, although a public utility, is not a governmental entity. Defendant's right to inspect *its* equipment at reasonable hours is set forth in the tariff regulations governing its operations. Plaintiffs have not made a persuasive argument to justify extending the rationale of *See* and *Camara*, and we shall not do so. Hence, plaintiffs' allegations on this point do not state a claim upon which this action may be based.

Finally, plaintiffs raise a due process argument under the 14th Amendment. However, it appears that the only right of which plaintiffs conceivably could have been deprived without [172] due process of law is a property right. Our Court of Appeals has made clear that an action does not lie under Sec. 1983 where a person seeks to protect only property or monetary rights. *Ream* v. *Handley*, 359 F. 2d 728, 731 (7th Cir. 1966).

It appearing that the amended complaint does not state a cause of action under any of the theories advanced by plaintiffs, the amended complaint must be dismissed.

Enter: /s/ A. L. Marovitz,
Abraham L. Marovitz,
Judge.

Dated:

February 7, 1968.